STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Talbot, P.J., and Fitzgerald and Whitbeck, JJ.]

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 146478
Plaintiff-Appellee,	Court of Appeals No. 307758
v	St. Clair Circuit Court No. 06-001700-FC
RAYMOND CURTIS CARP,	
Defendant-Appellant. /	

MOTION OF ST. CLAIR COUNTY PROSECUTOR AND ATTORNEY GENERAL BILL SCHUETTE TO FILE SUPPLEMENTAL AUTHORITY AND SHORT REPLY TO CARP'S SUPPLEMENTAL BRIEF

146478 (136)

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Dated: March 28, 2014

Motion to File Supplemental Authority and Short Brief

Pursuant to MCR 7.313, Attorney General Bill Schuette and Prosecutor Michael Wendling, by and through their attorneys, Solicitor General Aaron D. Lindstrom, Deputy Solicitor General B. Eric Restuccia, and Assistant Prosecuting Attorney Hilary Georgia, respectfully request that they be permitted to file supplemental authority and a short brief (two pages) in response to Carp's supplemental briefing. The prosecution states the following in support of the motion:

1. On March 6, 2014, this Court entertained oral argument in this case, and two other related cases, *People v Cortez Davis* (No. 146819) and *People v Eliason* (No. 147428);

2. On March 24, 2014, defendant Raymond Carp filed a motion to file supplemental authority and supplemental briefing on one of the questions raised at oral argument;

3. On March 25, 2014, this Court granted this motion;

4. Concurrent with this motion, the St. Clair County Prosecutor and the Attorney General seek to file a short brief (two pages) in response to this filing so that this Court will have the benefit of the consideration of each of the parties on the matter.

WHEREFORE, the St. Clair County Prosecutor and the Attorney General respectfully request that this Court grant the motion and allow the filing of the brief.

BRIEF

The St. Clair County Prosecutor and the Attorney General seek to file this brief (1) to provide an additional authority; and (2) to address Carp's supplement on the retroactive application of the U.S. Supreme Court's death penalty cases.

Supplemental Authority

On March 21, 2014, a federal district court in the Eastern District of Virginia concluded that the decision in *Miller v Alabama,* 132 S Ct 2455 (2012), does not apply retroactively. See Attachment A, *Sanchez v Vargo,* 2014 WL 1165862 (E.D. Va). The court held that "[b]ecause *Miller* adds a procedural safeguard that must be followed prior to imposition of a life sentence, its rule is procedural and not substantive." *Id.* at *6 (internal quotes, citation, and brackets omitted).

Death Penalty Jurisprudence – Response

In his supplemental brief, Carp argues that "the retroactive application of [*Sumner v Shuman,* 483 US 66 (1987), and *Lockett v Ohio,* 438 US 586 (1978)]" demonstrate that *Miller*'s "abolishment of mandatory sentencing and requirement for individualized sentencing should similarly be applied retroactively." Carp's Supplemental Brief, p 3. The prosecution disagrees.

The controlling standard about the retroactive application of new rules come from *Teague v Lane,* 489 US 288 (1989). The *Teague* standard ensures that a substantive rule applies retroactively because otherwise there is "a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v Summerlin,* 542 US 348, 352 (2004) (internal quotes and citations omitted).

Because the federal and state appellate cases on the retroactive application of *Sumner* and *Lockett* (death penalty cases) that Carp cites do not apply the *Teague* standard for retroactivity, they provide no significant guidance to this Court in its task of examining whether the *Miller* rule is substantive or procedural. In fact, none of these decisions even include the word "substantive" *one time.* See *Thigpen v Thigpen,* 926 F2d 1003 (CA 11, 1991) (*Sumner*); *Dutton v Brown,* 812 F2d 593 (1987) (*Lockett*); *Songer v Wainwright,* 769 F2d 1488 (CA 11, 1985) (*Lockett*); *Riley v Wainwright,* 517 So2d 656 (Fla 1987) (*Lockett*). There is no *Teague* analysis to rely on as persuasive.

Rather, the prosecution refers the Court to the most recent federal court's decision in *Sanchez,* Attachment A, which cites the U.S. Supreme Court guidance from its death-penalty jurisprudence in concluding that *Miller* is not retroactive:

> [T]he Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v Singletary*, 520 US 518, 539 (1997) (foreclosing retroactive application of *Espinosa v Florida,* 505 US 1079 (1992)); *Sawyer v Smith*, 472 US 227, 241 (1990) (*Caldwell v Mississippi*, 472 US 320 (1985)); *Beard v Banks*, 542 US 406, 417 (2004) (*Mills v Maryland*, 486 US 367 (1988)); see also *Saffle v Parks*, 494 US 484, 495 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague*'s first exception). [*Sanchez,* *5 (parallel cites omitted).]

These U.S. Supreme Court cases provide the best guidance to the Court on the correct application of *Teague.*

CONCLUSION AND RELIEF REQUESTED

The St. Clair County Prosecutor and the Attorney General respectfully request that this Court allow the prosecution to file this supplemental authority and short responsive brief.

Respectfully submitted,

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Attachment A

Slip Copy, 2014 WL 1165862 (E.D.Va.)
(Cite as: 2014 WL 1165862 (E.D.Va.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Virginia,
Richmond Division.
David Joseph SANCHEZ, Jr., Petitioner,
v.
Marie VARGO, Respondent.

Civil No. 3:13CV400.
Signed March 21, 2014.

Jonathan Andrew Henry, King & Spalding, Washington, DC, for Petitioner.

Victoria Lee Johnson, Office of the Attorney General Richmond, VA, for Respondent.

MEMORANDUM OPINION

ROBERT E. PAYNE, Senior District Judge.

*1 David Joseph Sanchez, Jr., a Virginia inmate proceeding by counsel, submitted this 28 U.S.C. § 2254 petition (" § 2254 Petition"). Sanchez argues that his life sentence without possibility of parole violates the Eighth Amendment [FN1] under *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) and that *Miller* announced a new, previously unavailable rule of constitutional law retroactive to cases on collateral review, thus providing a belated commencement of the limitation period under 28 U.S.C. § 2244(d)(1)(C). Marie Vargo has moved to dismiss. Sanchez has replied. The matter is ripe for disposition. Because the statute of limitations bars the § 2254 Petition, the Motion to Dismiss will be granted.

FN1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

I. PROCEDURAL HISTORY

The Circuit Court of the County of Chesterfield ("Circuit Court") convicted Sanchez of capital murder, attempted robbery, use of a firearm in the commission of a murder, and use of a firearm in the commission of an attempted robbery, committed at the age of seventeen, and sentenced him to life plus eighteen years in prison. *Commonwealth v. Sanchez,* Nos. CR99F00507–01 through –04, at 1 (Va.Cir.Ct. Dec. 16, 2009).[FN2] The Court of Appeals of Virginia denied Sanchez's petition for appeal. *Sanchez v. Commonwealth,* No. 0047–00–2, at 1 (Va. Ct.App. June 23, 2000). On January 5, 2001, the Supreme Court of Virginia refused Sanchez's petition for appeal. *Sanchez v. Commonwealth,* No. 001757, at 1 (Va. Jan. 5, 2011). Sanchez filed no other challenges to his conviction and sentence.

FN2. Sanchez notes that, at the time of his conviction, under Virginia state law, the Circuit Court was required to either impose a sentence of death or a sentence of life in prison without parole. (§ 2254 Pet. 1); *see* Va.Code Ann. § 18.2–10(a) (West 1999). The defense offered abundant mitigating evidence during the two-day sentencing to persuade the jury to impose a sentence of life without parole instead of death. (*See* § 2254 Pet. 5–7 (citations omitted).) The mitigating evidence presented during sentencing persuaded the jury not to impose the death penalty. Nevertheless, under Virginia's sentencing scheme, regardless of the mitigating evidence submitted, the Circuit Court could not sentence Sanchez to any sentence less severe than life without parole. (*Id.* at 1.)

On June 24, 2013, Sanchez filed this § 2254 Petition, arguing that his life sentence without the possibility of parole violates the Eighth Amendment

under *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

II. STATUTE OF LIMITATIONS

Vargo contends that the federal statute of limitations bars Sanchez's claims. Section 101 of the Anti-terrorism and Effective Death Penalty Act ("AEDPA") amended 28 U.S.C. § 2244 to establish a one-year period of limitation for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. Specifically, 28 U.S.C. § 2244(d) now reads:

> 1. A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> *2 **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> 2. The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Sanchez's conviction became final for the purposes of § 2244(d) on April 5, 2001, the day upon which the time expired for Sanchez to seek certiorari to the United States Supreme Court. *Hill v. Braxton,* 277 F.3d 701, 704 (4th Cir.2002) ("[T]he one-year limitation period begins running when direct review of the state conviction is completed or when the time for seeking direct review has expired ...." (citing 28 U.S.C. § 2244(d)(1)(A))); *see* Sup.Ct. R. 13(1) (requiring a petition for certiorari to be filed within ninety days of entry of judgment by state court of last resort or of the order denying discretionary review). Thus, under § 2244(d)(1)(A), Sanchez had until April 5, 2002 to file his § 2254 Petition. Sanchez filed his § 2254 Petition more than ten years after that date. Thus, the statute of limitations bars Sanchez's § 2254 Petition unless Sanchez demonstrates entitlement to a belated commencement of the limitation period under § 2244(d)(1)(B)-(D) or equitable tolling.

Sanchez does not argue that that is a case of equitable tolling. Nor does the record support application of the doctrine. Sanchez only argues entitlement to a belated commencement of the limitations period under § 2244(d)(1)(C) based upon *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) which was decided on June 25, 2012. For *Miller* to make Sanchez's petition timely, the "right" in *Miller* must "ha[ve] been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2244(d)(1)(C). As discussed below, although the right in *Miller* is new, it is not retroactively applicable to cases on collateral review.

III. THE NEW RULE DOCTRINE

A. Demand For Relief Under *Miller*

In *Miller v. Alabama,* the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." —— U.S. ——, ——,

132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012) (citation omitted).[FN3] Sanchez argues that his § 2254 Petition satisfies the conditions of § 2244(d)(1)(C) because *Miller* recognized a new right which applies retroactively to his § 2254 Petition.

> FN3. In reaching that conclusion the Supreme Court noted, that "[b]ecause that holding is sufficient to decide these cases, we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles...." *Miller,* 132 S.Ct. 2469.

The Court looks to *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) to determine whether *Miller* entitles Sanchez to a belated commencement under § 2244(d)(1)(C). *See United States v. Powell,* 691 F.3d 554, 557 (4th Cir.2012). *Teague* provides that new rules of constitutional criminal procedure generally are not applicable to cases on collateral review. *Teague,* 489 U.S. at 310. This principle protects the societal interest in the finality of convictions. *Id.* " 'No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.' " *Id.* at 309 (quoting *Mackey v. United States,* 401 U.S. 667, 691, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

B. Application Of The New Rule Doctrine For Cases On Collateral Review

***3** The Supreme Court has prescribed a three-step process for determining whether a constitutional rule of criminal procedure applies to a case on collateral review. *Beard v. Banks,* 542 U.S. 406, 411, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004).

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually new. Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Id. (citations omitted) (internal quotation marks omitted).

IV. ANALYSIS UNDER NEW RULE DOCTRINE

A. Sanchez's Conviction Became Final On April 5, 2001

The first step of the inquiry requires no extended analysis. Sanchez's conviction became final on April 5, 2001, the date on which the time expired for Sanchez to file a writ of certiorari in the Supreme Court of the United States. *See Caspari v. Bohlen,* 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994).

B. *Miller* Announced A New Rule

The next step in the analysis requires a determination of whether *Miller* announced a new rule when measured against precedent as of April 5, 2001. The Supreme Court has explained that " 'a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' " *Chaidez v. United States,* —— U.S. ——, ——, 133 S.Ct. 1103, 1107, 185 L.Ed.2d 149 (2013) (quoting *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). "[A] holding is not so dictated ... unless it would have been 'apparent to all reasonable jurists.' " *Id.* (quoting *Lambrix v. Singletary,* 520 U.S. 518, 527–28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)).

The Court need not extensively survey the legal landscape at the time of Sanchez's conviction, as both Vargo and Sanchez agree that the rule in *Miller* is "new" as defined in *Teague.* (*See* Mem. Supp. Mot.

Dismiss 6.) Moreover, there is general judicial agreement that *Miller* established a new rule of constitutional law because it "held for the first time that the 'Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.' " *In re Morgan,* 713 F.3d 1365, 1366–67 (11th Cir.2013) *reh'g en banc denied,* 717 F.3d 1186, 1187 (11th Cir.2013) (quoting *Miller,* 132 S.Ct. at 2469); *see, e.g., Craig v. Cain,* No. 12–30035, 2013 WL 69128, at *1 (5th Cir. Jan.4, 2013); *Martin v. Symmes,* No. 10–cv–4753 (SRN/TNL), 2013 WL 5653447, at *15 (D.Minn. Oct. 15, 2013).[FN4]

FN4. Other courts have assumed without deciding that *Miller* announced a new rule. *See Contreras v. Davis,* No. 1:13cv722 (JCC), 2013 WL 6504654, at *4 (E.D.Va. Dec. 11, 2013); *Johnson v. Ponton,* No. 3:13–CV–404, 2013 WL 5663068, at *2 (E.D.Va. Oct.16, 2013).

Additionally, one need look no further than the disagreement between the justices in *Miller* to find support for the proposition that the rule announced in *Miller* was subject to debate amongst reasonable jurists. *See United States v. Claiborne,* 388 F.Supp.2d 676, 687 (E.D.Va.2005) (citing *Beard,* 542 U.S. at 416 & n. 5; *Sawyer v. Smith,* 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (describing a new rule as a result "over which reasonable jurists may disagree")). In *Miller,* four justices rejected the notion that the Eighth Amendment prohibited a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. 132 U.S. at 2477 (Roberts, C.J., dissenting).

***4** For the foregoing reasons, it seems rather clear that *Miller* announced a new rule.

C. The New Rule Announced In *Miller* Fails To Fall Within Either Of The Exceptions to Nonretroactivity

Given the societal interest in the finality of convictions, under *Teague,* "new rules of constitutional law are generally 'not ... applicable to those cases which have become final before the new rules are announced.' " *United States v. Mathur,* 685 F.3d 396, 399 (4th Cir.2012) (omission in original) (quoting *Teague,* 489 U.S. at 310). *Teague* recognizes two narrow exceptions to the general rule of nonretroactivity. *Id.* (citations omitted). First, a new rule applies retroactively if it is a substantive rule. *See Whorton v. Bockting,* 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007). A substantive rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague,* 489 U.S. at 307 (citation omitted) (internal quotation marks omitted), "or addresses a 'substantive categorical guarantee[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Saffle v. Parks,* 494 U.S. 484, 494–95, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (alteration in original) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 329, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). Second, a rule may be applied retroactively if it constitutes a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard,* 542 U.S. at 417 (citation omitted) (internal quotation marks omitted). As discussed below, *Miller* fails to fall within either of these exceptions to nonretroactivity.

1. No Substantive Rule

Sanchez first argues that *Miller* announced a substantive rule and thus, applies retroactively to cases on collateral review. Sanchez contends that *Miller* is a substantive rule because it prohibits a certain category of punishment for a class of defendants because of their status or offense. Sanchez argues that, because courts have found that *Graham v. Florida,* 560 U.S.

48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) announced a new rule of constitutional law retroactively applicable to cases on collateral review, *see, e.g., In re Sparks,* 657 F.3d 258, 262 (2011), that determination dictates the same treatment for *Miller.* (§ 2254 Pet. 14.) As explained below, this argument is not persuasive.[FN5]

> FN5. Unlike Graham, who was convicted of a nonhomicide robbery offense he committed as a juvenile, Sanchez, like Miller, was convicted of a homicide offense.

The United States Court of Appeals for the Fifth Circuit, in discussing the retroactivity of *Miller,* aptly explained when the first *Teague* exception applies. *See Craig,* 2013 WL 69128, at *1. In surveying its prior cases conducting a *Teague* analysis, the Fifth Circuit explained that the exception for a substantive rule

> appears to only apply when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses considerations for determining a sentence. For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles convicted of nonhomicide offenses. *Bell v. Cockrell,* 310 F.3d 330, 332 (5th Cir.2002) (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)); *In re Sparks,* 657 F.3d 258, 262 (5th Cir.2011) (citing *Arroyo v. Dretke,* 362 F.Supp.2d 859, 883 (W.D.Tex.2005) [;] *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) [; and, retroactively applying] *Graham v.* [*Florida*], 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) [in granting permission to file a successive habeas action]).

*5 By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary,* 520 U.S. 518, 539, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (foreclosing retroactive application of *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)); *Sawyer v. Smith,* 472 U.S. 227, 241 (1990) (*Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (*Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *see also Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

Id. at *1–2 (alterations added).[FN6]

> FN6. The Court has attempted to correct citation errors in the *Craig* decision.

In essence, whether *Miller* announced a substantive rule "turns on whether *Miller* categorically[[FN7]] barred the imposition of mandatory life sentences on juveniles or, rather, barred courts from imposing life sentences on juveniles without exercising some measure of discretion." *Johnson v. Ponton,* No. 3:13–CV–404, 2013 WL 5663068, at *5 (E.D.Va. Oct.16, 2013). The plain language of *Miller* indicates that the Supreme Court intended *Miller* to be a procedural, rather than a substantive rule. *Id.*

> FN7. In contrast to the language in *Miller,* the Supreme Court's language in *Graham v.*

> *Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), clearly indicates the announcement of a substantive rule. In *Graham,* the Supreme Court reviewed "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." 560 U.S. 52–53. The Court held
>
> > that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.
>
> *Id.* at 74–75 (alteration in original) (quoting *Roper v. Simmons,* 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). The Supreme Court further explained that "[c]ategorical rules tend to be imperfect, but one is necessary here." *Id.* at 75.

In *Miller,* the Supreme Court held that "the Eighth Amendment forbids a *sentencing scheme* that mandates life in prison without the possibility of parole for juvenile offenders." 132 S.Ct. 2469 (emphasis added) (citation omitted). This holding, however, did not absolutely prohibit the imposition of a sentence of life imprisonment without the possibility of parole on minors. Thus, by the plain language of the Supreme Court's decision, *Miller* fails to satisfy the first *Teague* exception to nonretroactivity "because it does not place a class of conduct (homicide by a juvenile) beyond the power of the state to proscribe, nor does it prohibit a category of punishment (life in prison without parole) for a class of defendants (juveniles) based on their offense (homicide)." *Martin,* 2013 WL 5653447, at *16.

In *Miller,* the Supreme Court explained that its decision was driven by "the confluence of [ ] two lines of precedent," including *Graham,* and similar cases categorically banning certain sentencing practices. *Miller,* 132 S.Ct. at 2463–64. However, the Court then expressly distinguished *Miller* from *Graham,* stating that,

> [o]ur decision *does not categorically bar a penalty for a class of offenders or type of crime*—as, for example, we did in *Roper* or *Graham. Instead,* it *mandates only* that a sentence follow a certain *process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

***6** *Miller,* 132 S.Ct. at 2471 (emphasis added). Thus, instead of categorically barring all sentences of life imprisonment for juveniles, the plain language of *Miller* only prohibits a sentencing scheme in which a particular sentence is mandatory, rather than the result of a process that takes into account the mitigating circumstances of youth before imposing such a sentence. *See id.* at 2471; *Craig,* 2013 WL 69128, at *2; *Martin,* 2013 WL 5653447, at *16.

Sanchez argues that, "[b]y categorically prohibiting the mandatory imposition of a sentence of life *without* the possibility of parole, *Miller* necessarily expands the range of possible sentences to include life *with* the possibility of parole." (§ 2254 Pet. 13.) The Eleventh Circuit was confronted with a similar argument and rejected it explaining that:

> The Supreme Court has held that a "new rule[ ] prohibiting a certain category of punishment for a

> class of defendants because of their status or offense," *Penry,* 492 U.S. at 330 ... is retroactive, but that rule applies only where a class cannot be subjected to a punishment "regardless of the procedures followed," *id.* "In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural." *Schriro v. Summerlin,* 542 U.S. 348, 354, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004))).... A new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed, not when the rule expands the range of possible sentences.

In re Morgan, 713 F.3d at 1368 (parallel citation omitted); *see also Johnson,* 2013 WL 5663068, at *5.

Because *Miller* "adds a procedural safeguard that must be followed prior to imposition of [a life] sentence," its rule is procedural and not substantive. *Johnson,* 2013 WL 5663068, at *5 (citing *Miller,* 132 S.Ct. 2464); *see In re Morgan,* 713 F.3d at 1368. Accordingly, *Miller* does not fall within *Teague's* first exception to nonretroactivity.

2. No Watershed Rule

Because *Miller* announced a new rule, and because it is clear that the rule is procedural and not substantive, that rule cannot be applied retroactively in this collateral attack unless it is a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding...." *Beard,* 542 U.S. at 417 (citation omitted) (internal quotation marks omitted). The Supreme Court repeatedly has emphasized the extremely limited scope of the second *Teague* exception. *See id.* This second exception

> is clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty. And, because any qualifying rule would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge, it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception.

*7 *Id.* (alteration and omission in original) (citations omitted) (internal quotation marks omitted). "In providing guidance as to what might fall within this exception, [the Supreme Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] (right to counsel), and only to this rule." *Id.* (citations omitted). Since *Teague,* the Supreme Court has "rejected *every* claim that a new rule satisfied the requirements for watershed status." *Whorton,* 549 U.S. at 418 (emphasis added) (citations omitted). To qualify as a watershed rule, a new rule must meet two requirements. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton,* 549 U.S. at 418 (citations omitted) (internal quotation marks omitted).

Sanchez argues that the rule in *Miller* satisfies the first requirement because "*Miller's* new rule prohibiting such a scheme was ... necessary to avoid the constitutionally impermissible risk of imposing a disproportionate and inaccurate sentence" on juveniles. (§ 2254 Pet. 16.) Sanchez contends that *Miller* also satisfies the second requirement because "the Court expressly overturned the sentencing schemes of twenty-nine sovereign jurisdictions" and "[s]uch a ruling 'alter[s] our understanding' of fair criminal proceedings for juveniles by striking down sentencing schemes across the country." (*Id.* (last alteration in original) (quoting *Whorton,* 549 U.S. at 418)). Sanchez argues that *Miller* amounts to a "watershed rule" because it is comparable to *Gideon.* That argument misses the mark.

In *Gideon,* "the Court held that counsel must be appointed for any indigent defendant charged with a

felony." *Whorton,* 549 U.S. at 419. *Gideon* concluded that, "[w]hen a defendant wishes to be represented by counsel is denied representation, ... the risk of an unreliable verdict is intolerably high." *Whorton,* 549 U.S. at 419 (citations omitted). The new rule announced in *Gideon* eliminated the "intolerably high" risk of an unreliable verdict. *Whorton,* 549 U.S. at 419 (citations omitted).

The rule in *Miller* is much more limited in scope, pertains to the sentencing phase of the proceeding, and the relationship of the rule announced in *Miller* "to the accuracy of the factfinding process is far less direct and profound." *Whorton,* 549 U.S. at 419. The Supreme Court "[has] not hesitated to hold that less sweeping and fundamental rules [applicable only to the sentencing phase of trial] do not fall within *Teague's* second exception." *Beard,* 542 U.S. at 418 (citing *O' Dell v. Netherland,* 521 U.S. 151, 167, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997); *Sawyer v. Smith,* 497 U.S. 227, 242–45, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990)).[FN8]

> FN8. In *O'Dell v. Netherland,* 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997), the Supreme Court held that a rule requiring that a capital defendant be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues his future dangerousness was not a watershed rule because the rule applied to a "limited class of capital cases" and "hardly ... altered[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding," *Id.* at 167 (alteration in original) (citations omitted) (internal quotation marks omitted).
>
> In *Sawyer v. Smith,* 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), the Supreme Court reviewed whether a "prosecutor's closing argument [to the jury] violated the Eighth Amendment ... by diminishing the jury's sense of responsibility for the capital sentencing decision, in violation of our decision in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *Sawyer,* 497 U.S. at 232. Among other remarks, the prosecutor told the jury that:
>
> [Y]ou yourself will not be sentencing [Petitioner] to the electric chair....
>
> ....
>
> Don't feel like you are the one, because it is very easy for defense lawyers to try and make each one of you feel like you are pulling the switch. That is not so .... and if you are wrong in your decision believe me there will be others who will be behind you to either agree with you or to say you are wrong....
>
> *Id.* at 231–32. The Supreme Court found that, the rule in *Caldwell,* that forbade "imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere," *id.* at 233 (citation omitted), despite enhancing the accuracy of capital sentencing, effected an incremental change only. *Id.* at 242–45. Thus, *Caldwell* failed to fall within the second *Teague* exception. *Id.* at 244–45. Accordingly, notwithstanding the prosecutor's improper comments, the Supreme Court refused to set aside the petitioner's death sentence.

Miller, unlike *Gideon,* effected an incremental change and affords a right to defendants in a limited class of cases. Thus, the Court cannot "conclude that 'this systematic rule ... is an 'absolute prerequisite to

fundamental fairness.' " *Beard,* 542 U .S. at 419 (quoting *Sawyer,* 497 U.S. at 244); *see Craig,* 2013 WL 69128, at *2; *Johnson,* 2013 WL 5663068, at *6. For the foregoing reasons, Sanchez has failed to demonstrate that *Miller* falls within *Teague's* second exception.

D. No Implicit Holding of Retroactivity

***8** Finally, Sanchez contends that the Supreme Court implicitly held that *Miller* retroactively applies to cases on collateral review because *Miller,* which was before the Supreme Court on direct appeal of his conviction and sentence, was consolidated with *Jackson v. Hobbs,* which was before the Court on collateral review from the Arkansas Supreme Court's denial of state habeas relief. *See Miller,* 132 S.Ct. at 2461–63. The Supreme Court remanded *Jackson* "for further proceedings not inconsistent with [its] opinion." *Id.* at 2475. Sanchez argues that, " 'once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.' " (§ 2254 Pet. 18 (quoting *Teague,* 489 U.S. at 300).) Thus, Sanchez concludes that the *Miller* rule must be applied retroactively to all cases on collateral review by virtue of its application to *Jackson.* (*Id.*) However, in *Sanchez,* the Respondent, the State of Arkansas, did not argue that *Teague* barred relief on collateral review. (§ 2254 Pet. 19.) Therefore, Sanchez is not similarly situated to Jackson because here, Respondent has argued that *Teague* bars relief on collateral review. While federal courts must take up a *Teague* analysis where necessary before addressing the merits, " 'a federal court may, but need not, decline to apply *Teague* if the State does not argue it.' " *Frazer v. South Carolina,* 430 F.3d 696, 704 n. 3 (4th Cir.2005) (quoting *Caspari,* 510 U.S. at 389). Accordingly, in *Miller,* the "failure [of Arkansas] to address the matter in its opening briefs to [the Supreme C]ourt could provide adequate grounds to forego [the *Teague*] inquiry altogether." *Id.* (citations omitted). Thus, the Supreme Court's silence about *Teague* in *Jackson* does not indicate that the Court intended the rule in *Miller* to apply retroactively to cases on collateral review. *See Johnson,* 2013 WL 5663068, at *4.

V. CONCLUSION

The Court agrees with the other courts that have addressed the issue, and concludes that the rule announced in *Miller v. Alabama,* — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) is not retroactively applicable to cases on collateral review. *See, e.g., Craig v. Cain,* No. 12–30035, 2013 WL 69128, at *1 (5th Cir.2013) (denying motion to reconsider denial of certificate of appealability because *Miller* failed to meet *Teague v. Lane,* 489 U.S. 288, 289, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) exceptions to nonretroactivity); *Contreras v. Davis,* No. 1:13cv722 (JCC), 2013 WL 6504654, at *34 (E.D.Va. Dec. 11, 2013) (holding in the alternative that § 2254 petition was untimely because *Miller* not retroactive to cases on collateral review); *Johnson v. Ponton,* No. 3:13–CV–404, 2013 WL 5663068, at *6 (E.D.Va. Oct.16, 2013) (denying as untimely a § 2254 petition seeking belated commencement of statute of limitations under *Miller*); *cf. In re Morgan,* 713 F.3d 1365, 1366–67 (11th Cir.2013) *reh'g en banc denied,* 717 F.3d 1186, 1187 (11th Cir.2013) (denying authorization to file a successive habeas petition because new rule in *Miller* not made retroactive); *Martin v. Symmes,* No. 10–cv–4753 (SRN/TNL), 2013 WL 5653447, at *15 (D.Minn. Oct. 15, 2013).

***9** Because *Miller* does not apply retroactively to cases on collateral review, Sanchez lacks entitlement to a belated commencement under § 2244(d)(1)(c). Thus, Sanchez's § 2254 Petition is untimely filed. Vargo's Motion to Dismiss (ECF No. 3) will granted and the § 2254 Petition will be dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion to Sanchez and counsel of record.

It is so ORDERED.

E.D.Va.,2014.
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